

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Kenneth Irish, Denise Marshall, Allen Moore and Scott Stillwell, on behalf of themselves and on behalf of all others similarly situated, a class action,

Plaintiffs,

v.

BNSF Railway Company, Burlington Northern Santa Fe Corporation, William Barbee, Francis A. Weber, John Doe #1, John Doe #2, ABC Insurance Company and DEF Insurance Company,

Defendants.

Civil File No. 08-469

ANSWER OF DEFENDANTS
BNSF RAILWAY COMPANY,
BURLINGTON NORTHERN
SANTA FE CORPORATION,
WILLIAM BARBEE AND
FRANCIS A. WEBER

Defendants BNSF Railway Company, Burlington Northern Santa Fe Corporation, William Barbee and Francis A. Weber (collectively “BNSF”) answer the complaint as follows:

1. Generally deny except as admitted or qualified.
2. As to paragraph 7, deny and state that the alleged water invasions were an Act of God.
3. Admit paragraphs 14 and 15.
4. As to paragraphs 16 and 17, admit only that William Barbee and Francis A. Weber are employees of BNSF and residents of Wisconsin.

5. As to paragraphs 2, 6, 10, 11, 12, 13, 49, and 50, lack knowledge sufficient to form a belief as to the truth of the allegations.

6. As to paragraphs 31 and 32, no response is required because they pertain to parties other than BNSF.

7. As to paragraphs 34, 35, 36, 37, 38, 39, 40, 41 and 42, admit that the complaint makes class action allegations and state that those allegations meet the jurisdictional prerequisites of the Class Action Fairness Act, 28 U.S.C. §§ 1332(d) & 1453; deny, however, that certification would be proper or that BNSF is liable to any class.

8. As to paragraphs 55 and 56, admit only that the amount in controversy exceeds the jurisdictional requirement of the small claims court and assert that the amount in controversy satisfies the damages demands necessary to invoke federal diversity jurisdiction pursuant to 28 U.S.C. § 1332 and federal subject matter jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332(d) & 1453.

AFFIRMATIVE DEFENSES

9. The complaint fails to state a claim upon which relief can be granted.

10. The complaint is completely preempted and substantively preempted by federal and state law.

11. Plaintiffs assumed the risk.

12. Plaintiffs failed to mitigate their damages.

13. Some or all of plaintiffs' injuries were caused by independent or intervening causes.

14. Venue is improper in Grant County.

15. William Barbee, Francis A. Weber, John Doe #1 and John Doe #2 have been fraudulently joined as defendants.

Dated: August 18, 2008

BRIGGS AND MORGAN, P.A.

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